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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 420

CHARLES S. SULLIVAN and CAMP HILL LUMBER COMPANY, INC.,

Petitioner

versus

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent

Petition for a Writ of Certiorari To The United States Circuit Court of Appeals For The Fifth Circuit

Ruth S. Sullivan Dadeville, Alabama

Counsel for Petitioners

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CHARLES S. SULLIVAN and
CAMP HILL LUMBER COMPANY, INC.,

v.

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled cause on the 11th day of April, 1966.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the United States District Court for the Middle District of Alabama, (R. pg. 14) is unofficially reported 35 FRD 301, and is printed in part, in Appendix A hereto. Opinion of the Fifth Circuit Court of Appeals is reported 359 F 2d 426, and is printed in Appendix B hereto. The opinion of the Fifth Circuit Court of Appeals in Wirtz vs. Jones et al., is reported in 340 F 2d 901, and is printed in pertinent parts, as Appendix C hereto.

JURISDICTION

Opinion of the Fifth Circuit Court of Appeals was rendered on the 11th day of April, 1966, and Judgment of said court was accordingly entered on the same date. (R.21-23, Appendix F) Application for Rehearing, En Banc,

timely filed, was denied on the 11th day of May, 1966. (R. pgs. 24-31, Appendix F) Mandate to the United States District Court was issued on the 18th day of May, 1966, after which, pursuant to Agreement of Parties to the cause, the District Court Ordered Stay of Execution pending determination of Petition for Writ of Certiorari. (Appendix E) Jurisdiction of this Court is invoked pursuant to 28 USCA 1254 (1).

QUESTIONS PRESENTED

(1) Sole issue presented by this Petition is whether actions pursuant to Section 17, Fair Labor Standards Act,(29 USCA 217) present issue known to common law so as to be within the purview of jury trial requirement of the Seventh Amendment of the Constitution of the United States and Rule 38 (a), (b) Federal Rules of Civil Procedure?

(2) Whether or not equitable injunction procedures of Section 17, Fair Labor Standards Act (29 USCA 217) may be employed as a statutory device to infringe upon employers' right to trial by Jury, as required by the Seventh Amendment to the Constitution of the United States, on common law issue: "work and labor done" by employees?

(3) Whether a request for a finding by the Court that there are due minimum wages or overtime compensation under Section 17, Fair Labor Standards Act, (29 USCA 217) is an exercise of Jurisdiction of a Court of Law so that trial by jury is a matter of Constitutional right?

(4) Whether Rule of Law of Beacon Theatres Inc. v. Westover, 359 U. S. 469, 79 S. Ct. 948, 3 L Ed 2d 988; Dairy Queen, Inc. v. Wood, 369 U. S. 469, 82 S. Ct. 894, 8 L Ed 2D 44; Seventh Amendment, Constitution of the United States; and Rule 38 (a), (b) Federal Rules of Civil Procedure, apply to proceedings pursuant to Section 17, Fair Labor Standards Act (29 USCA 217)?

STATUTE INVOLVED

The Statute involved is Section 17, Fair Labor Standards Act of 1938, as amended May 5, 1961, Pub. L. 87-30, Section 12b 75 Stat. 74, which provides:

> "The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of Section 215 of this title, including in the case of violations of Section 215 (a) (2) of this title the restraint of any withholding of payment of minimum wages or

overtime compensation found by the court to be due to employees under this Chapter (except sums which employees are barred from recovering at the time of the commencement of the action to restrain the violations by virtue of the provisions of Section 255 of this title." (29 USCA 217) May 5, 1961, Pub. L. 87-30, Sec. 12 (b), 75 Stat. 74.

STATEMENT

A Complaint was filed by W. Willard Wirtz, Secretary of Labor, United States Department of Labor against Charles S. Sullivan and Camp Hill Lumber Company, Inc., to restrain Defendants from withholding payment of minimum wages and over time compensation due certain of their employees under the FLSA, (R. 5,11) which employees were named. (R.8,9) Defendants answered denying any wages and overtime compensation were due any employees, and in their answer stated, "The Defendants demand a trial by jury on all issues so triable in this action."(R.12), the Answer being dated November 12, 1963. Four days after the filing of this Answer, Plaintiff filed his Motion to Strike this demand for jury trial, (R.13) which Motion was granted by Order of the United States District Judge, dated March 10, 1964. (R.14,15). Thereafter the cause was tried and resulted in judgment against the Defendants, in which they were ordered

to pay considerable sums of money to employees named in the Complaint.

Appeal was timely taken to the Fifth Circuit Court of Appeals, and therein on the 11th day of April, 1966, the Order of the District Court striking Defendants' demand for trial by jury was affirmed.(R.21) Appendix B. The decision of the Fifth Circuit Court of Appeals was based upon its prior determination on like issue of Wirtz vs. Jones et al. & Sauls, Inc.,et al., 340 F 2d 901, Appendix C. Petition for Rehearing, En Banc, was denied May 11, 1966. (R. 31).

Therefore, sole issue presented by this Petition for Writ of Centiorari is whether or not the interpretation of the Court of Appeals of a Federal Statute, namely Section 17, Fair Labor Standards Act, Supra, is a Constitutional interpretation, or is an interpretation in violation of the Seventh Amendment to the Constitution of the United States and Rule 38 (a), (b) Federal Rules of Civil Procedure.

REASONS FOR GRANTING WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

(1) The Court of Appeals has decided a Constitutional issue: trial by jury, in a way in conflict with applicable decisions of this Court. Wilkerson vs. U. S.,365 U. S. 399, 5 L Ed. 2d 633, 81 S. C. 567; reh. Den. 365 U. S. 890, 6 L ed. 2d 200, 81 S.

Ct. 1024; Meeker vs. Ambassador, 375 U.S. 160, 84 S. Ct. 273, 11 L Ed 2d 261; Beacon Theatres, Inc. vs. Westover,359 U. S. 500, 3 L Ed. 2d 988, 79 S. Ct. 948; Dairy Queen Inc. vs. Wood, 369 U.S. 469, 82 S. Ct. 894 8 L Ed. 2d 44; Simler vs. Conner, 372 U.S. 221, 9 L Ed. 2d 691, 83 S. Ct. 609, cer. granted, 368 U. S. 966, 82 S. Ct. 440, 7 L Ed. 2d 395; Swofford vs. B & W, Inc., 336 F. 2d 406; cer. den. 379 U. S. 962, 85 S. Ct. 653, 13 L Ed. 2d 557.

The Court of Appeals has rule that the Seventh Amendment does not apply to actions brought by the Secretary of Labor Under Sec. 17, Fair Labor Standards Act reasoning: (1) Congress did not say, that trial by Jury shall be had on issue of wages when Secretary brings the action and absent such provision there is no jury trial. (2) Public interest dictates equitable action for an injunction to restrain withholding of wages earned but unpaid. (3) Statute creates action unknown to common law. (Wirtz vs. Jones, 340 F 2d 901, Appendix C)

That this language is"in the teeth of" Supreme Court de.isions, supra, can be seen from statements of Dairy Queen vs. Woods,as follows:

> "...Action on a debt alleged due under a contract, it would be difficult to conceive of an action of a more traditionally legal character....Respondents' contention that this money claim is 'purely equitable' is based primarily upon the fact that their complaint is case in terms of an 'ac-

counting' rather than in terms of an action for 'debt' or 'damages'. But the Constitutional right to trial by jury cannot be made to depend upon the choice of words used in pleading."

That proceedings under Section 17, FLSA, turn on common law issue "work and labor done" cannot be denied. Hence the Seventh Amendment applies. That a Complaint cast in equitable terms cannot be employed as a means to deprive litigants of trial by jury is settled. It is but another step to hold that a Statute cast in equitable terms cannot deprive a litigant of his right to trial by jury! United States v. Jepson, 90 F Supp. 983. Compare Section 216 Fair Labor Standards Act, 29 USCA 216 May 5, 1961, Pub. L. 87-30, Sec. 12A, 75 Stat. 74, where trial by jury is not questioned on issue "work and labor done". That Secretary's suit is that "magic" which transforms legal actions to equitable actions in Constitutionally doubtful.

(2) The Court of Appeals has determined an important Constitutional Question of Law, of first impression in appellate Courts, a Question of General Public Importance, to vast numbers of litigants, and of importance to an administrative agency of the United States, and in its determination has ruled that a Constitutional Amendment does not apply to a federal Statute, a concept new to Law of the United States. Therefore, Writ of Certiorari should be granted to superintend and supervise the Lower Courts of the United States, Yellin v. United States, 83 S. Ct.

1828, 374 U.S. 109, 10 L Ed. 2d 778; 75 S. Ct.623, 349 U. S. 133, 99 L Ed. 942 (same case); United States v. Aaron Zacks, et al., 375 U. S. 59, 84 S. Ct. 178, 11 L Ed. 2d 128; Kossick vs. United Fruit Co., 365 U. S. 731, 6 L Ed 2d 56, 81 S. Ct. 886, reh. d., 366 U. S. 941, 6 L Ed. 2d 852, 81 S. Ct. 1657; Hickman vs. Taylor, 329 U.S. 495, 91 L Ed. 451, 67 S. Ct. 385; Rice V. Sioux City Cemetery, 349 U. S. 70,99 L Ed. 897, 75 S. Ct. 614; Barenblatt v. United States, 360 U. S. 109, 3 L Ed 2d 1115. 79 S. Ct. 1081; Forsyth v. City of Hammond, 166 U. S. 506, 41 L Ed. 1095, 17 S. Ct. 665; Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 524, 559, 1 L Ed. 2d 493, 515, 77 S. Ct. 443, 459, 478.

The injunction of Beacon Theatres,Inc. v. Westover, that "only under the most imperative circumstances which we can not now anticipate" can right to trial by jury "on legal issue be lost" has been ignored by determination of lower Courts. Nor have the Courts in face of the Seventh Amendment issue balanced competing private and public interests. Barenblatt v. United States. And suggestions of Constitutional interpretation of Section 17, FLSA, as contained in Beacon Theatres v. Westover have been ignored: trial by jury on issue "wages and hours" and injunction based upon jury verdict, if Plaintiff shows cause for issue of injunction. As this determination stands scope of equity has been "enlarged, not reduced" as required by the Federal Rules of Civil Procedure.

Reported cases on Seventh Amendment

and Section 17, FLSA are: Wirtz v. Robert E. Bob Adair, 224 F Supp. 750; Wirtz v. Alapaha Yellow Pine Products, 217 F Supp. 465; Wirtz V. W. G. Lockhart Construction Co., 230 F Supp. 823; Wirtz v. Active City Wide Service Co.,230 F Supp. 666; Wirtz v. Norton, 34 FRD 535; Wirtz v. English, 245 F. Supp. 628; Wirtz v. Thompson Packers,224 F. Supp. 960, and cases involving Petitioners and the Jones case. Some divergence of view exists among District Courts, but Jones and Sauls determination appears to be view of Court of Appeals.

Above listed cases are not sole causes in which the issue was raised. For a completer listing see WH cases.

For a severe criticism of the holding of the Court of Appeals below see "Fair Labor Standards Act and Trial by Jury", 65 Columbia Law Review 514 (March 1965), a critique of Wirtz v. Jones, Supra.

In Summary, ruling of Court below determines that Congressional creation of new statutory remedy obviates consideration of statute in light of the Constitution and the Seventh Amendment, and ignores the rule that Right to Trial by jury depends upon basic nature of the action, traditions of the action, and context of the issues. Beacon Theatres, Inc. v. Westover, supra; Dairy Queen, Inc. v. Wood, Supra; DePinto et al. v. Provident Security Life Ins. Co. et al., 323 F 2d 826; Leimer v. Woods, 196 F 2d 828. The Creations of Congress labelled by Court "statutory actions" could be endless and "Stat-

utory" tyranny could result!

CONCLUSION

For the foregoing reasons, and upon authorities cited, Petitioners pray that Writ of Certiorari be granted.

Respectfully Submitted,

Ruth S. Sullivan

Ruth S. Sullivan
Box 332
Dadeville, Alabama
Counsel for Petitioners

August 3, 1966

APPENDIX A

MEMORANDUM OPINION

(style omitted)

(style omitted)

MEMORANDUM OPINION

This is an action by the Secretary of Labor United States Department of Labor suing to enjoin the defendants from violating the provisions of Secs. 15 (A) (2) and 15 (a) (5) of the Fair Labor Standards Act, as amended, and to enjoin and restrain the Defendants from withholding the payment of minimum wages and overtime compensation in the total amount of $7,668.44.

***

The question now presented by the Plaintiff's motion to strike the Defendants' demand for a jury trial has received and is continuing to receive considerable attention by the lower courts. As yet, there has been no appellate court decision on the question. Of the twelve decisions called to the attention of this Court on the question.....ten of them have determined that the Defendants have no such right. Two of them have held that the Defendants in such instances are entitled to the jury trial.

The defendants' contention, in support of their demand for a jury trial, is simply that they have a right under the Seventh Amendment to the Constitution of the United States to have a jury determine whether or not they owe their employees---or former employees, as the case may be---money as earned compensation, which has not been paid.

***

The Plaintiff, in asking this Court to strike the jury trial demand, argues that the Fair Labor Standards Act established statutory rights which were not "contractual or common law rights" within the meaning of the Seventh Amendment and that the Fair Labor Standards Act established remedies which were unknown to the common law.

***

This Court concludes that the statutory remedy here involved, is clearly equitable; that the action is brought by the Secretary of Labor in the public interest under specific authority from Congress and is therefore, not a common law cause of action within the meaning of the Seventh Amendment to the Constitution of the United States, or Rule 38 (a), Federal Rules of Civil Procedure. Since the Defendants have no unqualified right to a trial by jury and since no reason appears in this case for this Court to depart from its general equitable procedure in injunction cases, the motion of the Plaintiff to strike the Defendants' jury demand will be granted.

***

APPENDIX B

OPINION BELOW

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21905

CHARLES S. SULLIVAN and CAMP HILL LUMBER COMPANY, INC.,

Appellants,

versus

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

(April 11, 1966.)

Before TUTTLE, Chief Judge, THORNBERRY, Circuit Judge, and LYNNE, District Judge.

PER CURIAM: Appellant here makes a direct appeal that this court reverse its recent decision in *Wirtz v. Jones, et al.*, 5 Cir., 340 F.2d 901, in which we held that the VIIth Amendment does not confer a right to a jury trial

in an action filed by the Secretary of Labor under Section 17 of the Fair Labor Standards Act for the restraint of a withholding of wage underpayments found by the court to be due employees under the Fair Labor Standards Act.

There having intervened no new statute law, nor any Supreme Court decision, this court declines to depart from the principle of *stare decisis* and consider reaching a different result.

The judgment is AFFIRMED.

APPENDIX C

EXTRACTS:

Wirtz v. Jones, et al. & Sauls, Inc., et al., 340 F 2d 901

(style omitted)

***

"The action against ...Jones is somewhat less simple, because it concerns not only the injunctive restraint of future violations, but also the restraint of the continued withholding of minimum wages and overtime compensation due to certain employees. The Defendants base their claims to a right to a jury trial on several assertions: that there is here a disputed issue of fact, i.e., whether or not allegedly earned but unpaid wages are due to certain employees by the employer; that this is no more than a private claim between private adversaries; that no public right is involved; and that the claim is not for restitution of wages, nor paid because of wrongful discharge, but is simply one for remuneration for work done. They further argue that because of these considerations the Seventh Amendment to the Constitution of the United States forbids denial of a jury in the trial of the factual issue in an action such as this which, they say, was cognizable to the common law in 1789.

"The fallacy implicit in all of the appellees' claims is the assertion or assumption that no public right is involved. ..."

***

"...There is nothing in the wording of Sec. 17, as amended in 1961, or in the legislative history of Section 17, or any

of its amendments, to suggest that Congress intended to provide for the trial of factual issues arising under it by a jury. Had it so intended it could easily have said so....Absent any statutory provision for jury trial, as is clearly the case here, the Defendants have no right to demand it...

"The appellees argue that a right to jury trial may be inferred from a comparison of Section 17 and Section 16 (b). Under Sec. 16 (b) the employees may sue the employer for back pay, and under Sec. 16 (c) the Secretary, upon the written request of the employees, may bring the action. Such cases are analogous to actions at law, e. g. debt or assumpsit and on proper demand, are triable before a jury.,.."

***

"The appellees protest that the failure by Congress to provide for jury trial contravenes their rights under the Seventh Amendment to the Federal Constitution. They identify the present case with decisions by the Supreme Court and by this Court where there is a blending of legal and equitable issues and demands for relief and in which the Courts have held that neither the association of the legal issues with those which are equitable nor the seeking of equitable relief can deprive a party of his rights to a jury trial on the legal issues. Dairy Queen, Inc. v. Wood, 369 U.S. 469; Beacon Theatres v. Westover,359 U. S. 500 Thermo-Stitch Inc. v. Chemi-Cord Processing Corp.

294 F 2d 486.

***

"In the instant case, however, the purpose of the injunction to restrain the withholding of wages due is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest....
The order to pay withheld but earned remuneration is to redress a wrong being done to the public good."

***

APPENDIX D

JUDGMENTS BELOW

(style omitted)

(style omitted)

JUDGMENTS BELOW

Before Tuttle, Chief Judge, Thornberry, Circuit Judge, and Lynne, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgment of said District Court in this cause be, and the same is hereby affirmed.

April 11, 1966.

JUDGMENT
(May 11, 1966)

Before Tuttle, Chief Judge, Thornberry, Circuit Judge, and Lynne, District Judge.

Per Curiam

It is ORDERED that the Petition for Rehearing filed in the above styled and numbered cause be and the same is hereby denied.

APPENDIX E

ORDER BELOW

(style omitted)

(style omitted)

ORDER

***

Upon consideration of the Motion of Defendants, the stipulation of the parties and the amendment to the Supersedeas bond each having been presented to this Court on this date,

***

it is ORDERED that execution upon the judgment of this Court made and entered herein be and the same is hereby stayed pending the Defendants' appeal to the Supreme Court of the United States.

Done this the 20th day of June, 1966.

***

CERTIFICATION OF SERVICE

I, the undersigned Counsel for Petitioners, hereby certify that a copy of the within Petition for Certiorari in the Supreme Court of the United States, has been mailed, Air Mail, postage prepaid, as required by Rule 33, Rules of the Supreme Court of the United States, to the respective post office addresses of the following:

Solicitor General of the United States, Hon. Thurgood Marshall

Hon. Charles Donahue, Solicitor of Labor

Hon. Robert E. Nagle, Office of Solicitor of Labor

Hon. Bessie Margolin, Associate Solicitor of Labor

Hon. Beverley R. Worrell, Regional Attorney, Department of Labor

Hon. G. Floyd Ansley, Department of Labor, Attorney

Certified, at Dadeville, Alabama, this the 3 day of August, 1966.

Ruth S. Sullivan

Counsel for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 420

CHARLES S. SULLIVAN AND CAMP HILL LUMBER COMPANY, INC., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 359 F.2d 426. The memorandum opinion of the district court on the issue presented herein (reprinted in part in Pet. App. A) is reported at 35 F.R.D. 301. The district court's findings and conclusions are not officially reported but appear at 16 WH Cases 554 and 50 Lab. Cases ¶ 31,604.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1966. A petition for rehearing *en banc* was denied on May 11, 1966. The petition for a writ of certiorari was filed on August 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the inclusion, in a complaint filed by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, of a prayer for the "restraint of any withholding" of wage underpayments found by the court to be due to employees under the Act, converts the action into an action at law with a constitutional right to a jury trial.

STATUTE INVOLVED

Section 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1961 (75 Stat. 65), 29 U.S.C. 201, 217, provides:

> The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums

which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act requesting the court to restrain petitioners from continuing to violate the minimum wage, overtime and record-keeping provisions of the Act, and from continuing to withhold payment of minimum wages and overtime compensation due certain of the employees under the Act. Petitioners, denying violations of the Act's provisions, filed a demand for trial by jury. Respondent's motion to strike this demand was upheld by the district court on the ground that this was "not a common law cause of action within the meaning of the Seventh Amendment to the Constitution of the United States, or Rule 38(a), Federal Rules of Civil Procedure," but was "brought by the Secretary of Labor in the public interest under specific authority from the Congress"—such authority being "designed and intended by Congress to be included as a part of 'the general equity jurisdiction of the courts' " (35 F.R.D. at 303-304). Accordingly, the case was tried by the district court, which concluded that the defendants had been violating the Act in the respects alleged. The court thereupon enjoined further such violations as well as the continued withholding of a total of $5716.53 due under the Act to 24 employees.

The court of appeals affirmed the denial of the demand for jury trial, adhering to its earlier decision in *Wirtz* v. *Jones*, 340 F.2d 901, in which it had reached the same conclusion.

ARGUMENT

The decision below presents no conflict with any relevant decisions[1] and further review in this Court is not warranted.

As the Fifth Circuit pointed out in *Wirtz* v. *Jones*, *supra*, unlike an action for back wages under Section 16(b) or 16(c) of the Fair Labor Standards Act, the purpose of restraining the withholding of wages due under the Act "is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest," and this remedy "is simply a part of a reasonable and effective means which Congress, after trial and error, found it necessary to adopt to bring about general compliance" (340 F.2d at 904). As the court further pointed out, when Congress in 1961 "restored the full equity powers of the courts in exercising the jurisdiction granted

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[1] While no other court of appeals has yet ruled on the issue presented here, each of the district courts outside the Fifth Circuit which has done so has reached the same conclusion as the courts below. Of the many such decisions, those which have been reported are: *Wirtz* v. *Active City Wide Service Co.*, 230 F.Supp. 666 (N.D. Ill.); *Wirtz* v. *Robert E. Bob Adair, Inc.*, 224 F.Supp. 750 (W.D. Ark.); *Wirtz* v. *Tinker's Bigg & Littel Stores*, 16 WH Cases 657, 50 Labor Cases ¶ 31,622 (N.D. Cal., not officially reported); *Goldberg* v. *Thompson*, 15 WH Cases 883, 47 Labor Cases ¶ 31,410 (S.D. Cal., not officially reported); *Wirtz* v. *Wheaton Glass Co.*, 253 F.Supp. 93 (D. N.J.).

in § 17", it gave no indication that factual issues arising in such an action were to be tried by a jury; on the contrary the language used "is couched in traditional equitable terms of 'restraining' a continuing wrong" and the "equitable" action authorized in relation to withholding is simply emphasized as a part of the jurisdiction to restrain violations generally" (340 F.2d at 903-904).

These circumstances plainly distinguish this case from the decisions of this Court upon which petitioners rely. Each of those cases dealt with private causes of action which involved not only equitable issues but also claims which had traditionally been regarded as "legal"—either because they were of common law origin or because they had been left by statute to enforcement through common-law actions. See *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (treble-damage claim under the anti-trust statutes); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (action for money based on alleged breach of contract and infringement of trademark); *Simler* v. *Conner*, 372 U.S. 221 (action between client and lawyer over the amount of fee due under a contingent fee contract); and *Meeker* v. *Ambassador Oil Corp.*, 375 U.S. 160 (action involving determination of the ownership of an overriding royalty interest under a gas and oil lease).[2] In the instant case, on the other hand, not

[2] The court of appeals decisions relied on by petitioners are similarly distinguishable since, in addition to the "equitable" issues presented, they also involved claims which were clearly "legal" in nature: *Swofford* v. *B & W, Incorporated*, 336 F.2d 406 (C.A. 5), certiorari denied, 379 U.S. 962 (dam-

only has Congress created the rights and liabilities which are at issue, but it has deliberately provided in Section 17 for their enforcement by a proceeding which is "one unknown to the common law"; accordingly, "[t]he contention under the Seventh Amendment is without merit." *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 48-49.

The correctness of the decisions below is confirmed by this Court's holdings both under this Act (*Mitchell* v. *DeMario Jewelry*, 361 U.S. 288), and in an analogous statutory context under the Emergency Price Control Act (*Porter* v. *Warner Co.*, 328 U.S. 395), that even a general provision for enjoining illegal practices under a statute carries with it the power "to provide complete relief in light of the statutory purposes"—including the awarding of monetary restitution—and that such relief is simply an exercise of the *equitable* jurisdiction of the court (see *DeMario*, 361 U.S. at 291-292; *Porter*, 328 U.S. at 400-403).[3] While neither the *DeMario* nor *Porter* deci-

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ages claimed for patent infringement); *DePinto* v. *Provident Security Life Ins. Co.*, 323 F.2d 826 (C.A. 9) (action on behalf of corporation for damages resulting from negligence and breach of fiduciary duty). In *Leimer* v. *Woods*, 196 F.2d 828 (C.A. 8), also relied on by petitioners, the right to jury trial was upheld because a "legal" claim for treble damages under Section 205(e) of the Emergency Price Control Act was raised; the court recognized, however, that the additional claim for injunction and *restitution* was purely equitable in nature—a distinction which this Court had previously drawn in *Porter* v. *Warner Co.*, 328 U.S. 395.

[3] The *DeMario* case was decided prior to the 1961 Amendments to the Act, when there was in effect a proviso, added to section 17 in 1949, specifically prohibiting any court from

sions dealt specifically with the question of jury trial,[4] both these decisions were recently cited by this Court in *Katchen* v. *Landy*, 382 U.S. 323, 338, in holding that there is no right to a jury trial in an equitable-type proceeding under the Bankruptcy Act involving the recovery of a preference, even though such preference could also have been recovered in an action at law to which the Seventh Amendment would have applied. In there distinguishing the *Beacon Theatres* and *Dairy Queen* decisions, this Court ruled that where Congress has provided an equitable remedy as part of "a specific statutory scheme," the Seventh Amendment does not require the courts to "dismember a scheme which Congress has prescribed" simply because there also exists an alternative remedy at law (382 U.S. at 339). This conclusion is equally applicable with respect to the "specific statutory

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awarding restitution of unpaid minimum wages or overtime compensation in an action brought to restrain violations of the Act. That proviso was repealed in 1961 and the language expressly authorizing such awards was added. The *DeMario* decision held that the 1949 proviso did not preclude the awarding, as part of equitable relief, of reimbursement of lost wages to employees who had been discriminatorily discharged in violation of Section 15(a)(3) of the Act.

[4] In *DeMario*, however, the dissenting justices expressly recognized that the majority decision had reference to equitable jurisdiction not subject to the right of jury trial, for they stated their view that the 1949 proviso precluded the award of any restitution in an injunction action, and allowed recovery of wages "at the instance of the Secretary only in an action at law, brought under * * * [§ 16(c)], and *triable by a jury*," or in the employee's "own right an action at law, *triable by a jury*," under either § 16(b) or the common law" (361 U.S. at 303, emphasis added).

scheme" which Congress deliberately provided when it restored to the courts, under Section 17 of the Fair Labor Standards Act, the purely equitable power to restrain continuing offenses against the public interest by directing the restitution of wages unlawfully withheld.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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